



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 206, 211, and 213

[Docket DARS-2018-0052]

RIN 0750-AJ50

Defense Federal Acquisition Regulation Supplement: Brand Name or Equal (DFARS Case 2017-D040)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that requires the use of brand name or equal descriptions, or proprietary specifications or standards, in solicitations to be justified and approved.

DATES: Effective [Insert date of publication in the FEDERAL REGISTER] .

FOR FURTHER INFORMATION CONTACT: Ms. Carrie Moore, telephone 571-372-6093.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 83 FR 54696 on October 31, 2018, to implement section 888(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328), which requires that competition on DoD contracts not be limited through the use of brand name or equal descriptions, or proprietary specifications or standards, in solicitations, unless a justification for such specification is provided and approved in accordance with 10 U.S.C. 2304(f). Six respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

The paragraphs at DFARS 211.104 and DFARS 211.170 have been updated to clarify that the use brand name or equal descriptions or proprietary specifications and standards shall be justified and approved when using sealed bidding procedures, negotiated procedures, or simplified procedures for certain commercial items.

B. Analysis of Public Comments

1. Support for the Rule

Comment: Several respondents expressed support for the rule.

Response: DoD acknowledges the support for the rule.

2. Restrictions on Brand Name or Equal Descriptions

Comment: A respondent expressed concern that subjecting brand name or equal descriptions to the justification and approval process will discourage the use of solicitations that signal a preference for, but do not require, a specific brand or product.

Response: The language in the rule meets the intent of the statute at section 888(a) of the NDAA for FY 2017. When contracting without providing for full and open competition (e.g., requiring a specific brand or product particular to one manufacturer, or requiring specifications or standards that are proprietary to a specific entity), contracting officers are still required to justify such an action and have it approved in accordance with the processes of Federal Acquisition Regulation (FAR) 6.3 and DFARS 206.3.

3. Lifecycle Quality Assurance

Comment: Several respondents advised that requiring brand name or proprietary equipment typically assures that a certain level of quality and warranty will be conveyed with the item. The respondents expressed concern that DoD may face difficulties ensuring that equivalent products provide the same level of quality assurance as brand name or proprietary equipment during the product's lifecycle. Further, one respondent expressed

dissatisfaction with placing additional restrictions on the ability to use brand name descriptions when procuring complex system components, as the action prevents DoD from making the best decisions about the quality of goods being used in the national defense.

Response: The rule does not prohibit the use of brand name descriptions, brand name or equal descriptions, or proprietary specifications and standards, when necessary. Instead, the rule encourages the development of requirement descriptions that enable competition, to the maximum extent possible. For example, if a system component to be used in national defense requires a minimum level of quality and reliability, those physical, functional, and performance needs can be expressed in the description of the requirement and a competitive solicitation may be issued. If the component requirements for quality and reliability can only be expressed in terms of or met by a single brand name description, proprietary specifications or standards, or a brand name or equal description, then the description or specifications and standards may be used in the acquisition; but, only after the action is justified with sufficient facts and rationale and approved in accordance with FAR 6.3 and DFARS 206.3.

Comment: To mitigate life-cycle quality assurance concerns, one respondent suggested that solicitations utilizing brand name

or equal descriptions include a comparable life-cycle length for the product, as necessary, to ensure DoD receives an equal product in terms of durability and warranty.

Response: Requirements personnel determine and define the minimum physical, functional, and performance characteristics of a requirement necessary to ensure it will meet DoD's needs. At their discretion, requirements personnel can identify an essential life-cycle length or warranty coverage in the description of the requirement.

Comment: Another respondent suggested that removing the draft proposed text at DFARS 206.302-1(c)(2)(S-70), regarding the use of proprietary specifications and standards, may help alleviate concerns about DoD receiving a necessary level of quality assurance.

Response: The language in the rule meets the intent of the statute at section 888(a) of the NDAA for FY 2017, which requires that competition on DoD contracts is not limited by the use of proprietary specifications or standards in solicitations, unless a justification for such specifications or standards is provided and approved in accordance with FAR 6.3 and DFARS 206.3.

4. Application of Rule to Acquisitions Valued at or Below the Simplified Acquisition Threshold (SAT)

Comment: Some respondents advised that the rule is unclear whether the Government intends to apply the justification and approval requirement to acquisitions valued at or below the SAT.

Response: The rule does not apply the justification and approval requirement to acquisitions valued at or below the SAT. The rule adds text to DFARS 206.3, Other Than Full and Open Competition, and DFARS 213.5, Simplified Procedures for Certain Commercial Items, neither of which apply to acquisitions valued at or below the simplified acquisition threshold. The rule also adds text to DFARS subpart 211.1, Selecting and Developing Requirements Documents.

In the proposed rule, the requirement to execute a justification and approval when using such descriptions or specifications and standards appeared as a standalone statement under DFARS 211.1, with two subparagraphs directing the contracting officer to see the proposed rule text in DFARS 206.3 and 213.5, as applicable. The rule uses the title of FAR 13.5, Simplified Procedures for Certain Commercial Items, only to refer to the procedures for the acquisition of commercial supplies and services in an amount greater than the simplified acquisition threshold but not exceeding \$7 million.

The intent of the text in this subpart is to clarify that a justification and approval is required to include brand name or equal descriptions, or proprietary specifications or standards,

in DoD solicitations that use sealed bidding, or negotiated acquisition procedures, or simplified acquisition procedures for certain commercial items, as specified in the following two subparagraphs. To clarify the intent of the rule, the text in subpart 211.1 has been changed from a standalone statement to a statement that a justification and approval is required when using the procedures identified in the subsequent subparagraphs; and, to add a reference to "FAR 13.5" after simplified acquisition procedures for certain commercial items.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not create any new DFARS clauses or amend any existing DFARS clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory

action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 888(a) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017, which requires that competition in DoD contracts not be limited through the use of brand name or equivalent descriptions, or proprietary specifications or standards, in solicitations unless a justification for such specification is provided and approved in accordance with 10 U.S.C. 2304(f).

The objective of this final rule is to ensure that a justification is executed and approved prior to including brand name or equal descriptions, or proprietary specifications or standards, in a solicitation that uses simplified procedures for

certain commercial items or negotiated acquisition or sealed bidding procedures.

No public comments were received in response to the initial regulatory flexibility analysis.

The Federal Procurement Data System (FPDS) does not collect data on contracts awarded using brand name or equal descriptions or contracts that were competed and included proprietary specifications or standards. Currently, brand name or equal descriptions are procured through competitive procedures, but FPDS does not identify the subset of contracts that were awarded competitively using such descriptions.

FPDS can identify the number of offers received in response to a solicitation. This subset can help DoD better identify the number of competitive requirements that may have used such descriptions, specifications, or standards, but only received one offer for various reasons.

As a result, FPDS identifies that there were 127,536 contracts and orders competed and awarded in FY 2017 that only received one offer. Of the 127,536 new awards, 76,179 (60%) of these actions were awarded to 9,823 unique small business entities. The proposed rule applies to all entities who do business with the Federal Government and is not expected to have a significant impact on these entities, regardless of business size.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the rule that would meet the proposed objectives.

VII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 206, 211, and 213

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 206, 211, and 213 are amended as follows:

1. The authority citation for 48 CFR parts 206, 211, and 213 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 206—COMPETITION REQUIREMENTS

2. In section 206.302-1, paragraphs (c) and (S-70) are added to read as follows:

206.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

* * * * *

(c) *Application for brand-name descriptions.*

(2) Notwithstanding FAR 6.302-1(c)(2), in accordance with section 888(a) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the justification and approval addressed in FAR 6.303 is required in order to use brand name or equal descriptions.

(S-70) *Application for proprietary specifications or standards.* In accordance with section 888(a) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the justification and approval addressed in FAR 6.303 is required in order to use proprietary specifications and standards.

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PART 211—DESCRIBING AGENCY NEEDS

3. Section 211.104 is added to read as follows:

211.104 Use of brand name or equal purchase descriptions.

A justification and approval is required to use brand name or equal purchase descriptions—

(1) When using sealed bidding or negotiated acquisition procedures (see 206.302-1(c)(2) for justification requirements); or

(2) When using the simplified procedures for certain commercial items at FAR 13.5 (see 213.501(a)(ii) for justification requirement).

4. Section 211.170 is added to read as follows:

211.170 Use of proprietary specifications or standards.

A justification and approval is required to use proprietary specifications and standards—

(1) When using sealed bidding or negotiated acquisition procedures (see 206.302-1(S-70) for justification requirements); or,

(2) When using the simplified procedures for certain commercial items at FAR 13.5 (see 213.501(a)(ii) for justification requirements).

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

5. Section 213.501 is amended by—

- a. Redesignating paragraph (a) as paragraph (a)(i); and
- b. Adding new paragraph (a)(ii) to read as follows:

213.501 Special documentation requirements.

(a) * * *

(ii) In accordance with section 888(a) of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-

328), the justification and approval addressed in FAR 13.501(a) is required in order to use brand name or equal descriptions or proprietary specifications and standards.

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